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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-795

UNITED STATES OF AMERICA,
Respondent,

vs.

DONALD L. PEIFER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Third Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on February 14, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the opinion of the District Court, is not yet reported, but is appended hereto as Appendix A. The opinion of the District Court, reported at 474 F.Supp 498, (E.D. Pa. 1979) is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1980. On March 17, 1980, this Court entered an Order extending the time for filing this Petition to April 14, 1980. A copy of this Order is appended hereto as Appendix C. Jurisdiction of this Court is invoked under Section 1254(1), Title 18, United States Code.

QUESTIONS PRESENTED

1. Whether it was legally impossible for Petitioner to knowingly and willfully obstruct, resist, or impede an attempted execution of a search warrant in violation of 18 U.S.C. Section 1501 when the United States officer serving the search warrant never intended to execute the search warrant, never intended to be present during the search, and never intended to participate in conducting the search?

2. Whether the District Court, affirmed by the Court of Appeals, committed prejudicial error in not allowing the Petitioner charged with violating 18 U.S.C. Section 1501 to place in issue the invalidity of the search warrant, which was invalid on its face?

3. Whether Petitioner was deprived of a fair trial under the Due Process clause of the Fifth Amendment to the United States Constitution by the Proscecutor, in his closing argument, stating his opinion as to the Petitioner's guilt, said opinion being modified by the words "based on the evidence"?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18 United States Code, Section 1501; Title 18 United States Code, Section 3105; Title 18 United States Code, Fed.Rules Cr.Proc. rule 41(C); as well as Amendment V to the United States Constitution are involved in this case. These provisions are set forth in Appendix D hereto.

STATEMENT

A. Conviction and Sentence

This petition is for review of the judgment and sentence of the United States District Court for the Eastern District of Pennsylvania, Honorable J. Troutman presiding.

Petitioner was convicted of violating 18 U.S.C. Section 1501. Imposition of a prison sentence was suspended and the Petitioner was placed on probation for a period of thirty (30) days on condition that he pay a fine in the amount of $300.00.

The United States Court of Appeals for the Third Circuit affirmed the conviction.

B. Summary of the Record

Petitioner operates F. R. & S. Landfill in Exeter Township, Berks County, Pennsylvania. On April 24, 1978, U. S. Magistrate Peter D. Scuderi issued a search warrant directed "to United States Marshall or his authorized representative" authorizing a search on the premises known as F. R. & S. Landfill for samples of water and effluents suspected of being illegally discharged into the Schuylkill River.

On April 26, 1978, at approximately 10:15 A.M., Maureen Brennan, Dan R. Donnelly, and Mr. Thomas of the Environmental Protection Agency, and Peter Bronner of the Pennsylvania State Department of Environmental Resources entered the F. R. & S. Landfill without possessing a search warrant and without the permission of the Petitioner. The Petitioner, after discovering that Maureen Brennan and Peter Bronner did not have a search warrant, asked Peter Bronner to leave the property. Peter Bronner left F. R. & S. Landfill, contacted U. S. Deputy Marshall Duross, and returned to F. R. & S. Landfill accompanied by the Marshall.

At approximately 10:30 A.M., U.S. Deputy Marshall Duross entered F. R. & S. Landfill where he met the Petitioner. On meeting the Marshall, the Petitioner asked "so this is the big Marshall?". The Marshall never identified himself to the Petitioner as being a U. S. Deputy Marshall. Immediately thereafter, the Marshall served the Petitioner with one page of a multi-page search warrant which did not have attached an affidavit of probable cause. Petitioner peacefully accepted service of the search warrant. Thereafter, the Petitioner objected to the invalidity of the search warrant. Petitioner then put the search warrant in his pocket and walked away. There is absolutely no testimony whatsoever in the record that indicates that the Petitioner obstructed in any manner the Marshall's service of the search warrant.

Immediately after the Petitioner left the Marshall, the Marshall drove to higher ground on F. R. & S. Landfill in order to inform his headquarters by radio that the search warrant had been served. The Petitioner returned to the area approximately twenty (20) minutes later. Thereafter, Peter Bronner, Maureen Brennan, Mr. Donnelly and Mr. Thomas began to drive out of the F. R. & S. Landfill area. Peter Bronner and Maureen Brennan were in the first truck; Mr. Donnelly and Mr. Thomas were in the second truck. Petitioner then told David Hart to place a pick-up truck across this road in front of Peter Bronner's truck. It must be emphatically noted that at the time the Petitioner stopped Peter Bronner's truck and ordered Hart to place the truck across the road, the Marshall was not present. At this time, the Marshall was still parked on the higher ground of the F. R & S. Landfill area. The Marshall was parked on the higher ground for a period of time greater than thirty (30) minutes. The Marshall testified that the two EPA trucks were already stopped in the road and that the pick-up truck was already placed across the road when the Marshall began his descent from the higher ground. The Petitioner's actions were directed solely towards Peter Bronner, Maureen Brennan, Mr. Donnelly, and Mr. Thomas who were all unlawfully on the premises.

Mr. Hart did not place the pick-up truck across the road until approximately 11:30 A.M., approximately fifty (50) minutes after the Marshall arrived. During this period of time the Marshall could have executed the search warrant. The Marshall was not restricted from going to any area of F. R. & S. Landfill. The explanation for the Marshall's failure to execute the search warrant is simple: he never intended to execute the search warrant. The Marshall testified that his only purpose for being on F. R. & S. Landfill was "to serve the warrant only".

As noted above, the search warrant was directed to "the United States Marshall or his authorized representative". The Marshall testified that he did not authorize anyone else to execute the search warrant. The testimony of Maureen Brennan and Peter Bronner supported and corroborated the Marshall's testimony that no representative was authorized to execute the search warrant.

In addition to the facts that the Marshall never intended to execute the search warrant and that no representative was authorized to execute the search warrant, no one made an attempt to take a desired water sample from a pipe located only four hundred (400) feet away from where the EPA trucks were located. Further, not a single person that morning of April 26, 1978, requested the Marshall to come with them to take the samples.

No one who testified at the trial was actually qualified and able to take water samples. The fact that no one desired to take water samples on the morning of April 26, 1978, is easily shown by the simple fact that no one ever told David Hart to move his truck. No one even attempted to pass David Hart's truck although at least two vehicles passed Hart's truck without the truck being moved. Further, the three vehicles allegedly blocked by the pick-up truck could have exited the premises by way of another road.

At approximately 11:30 A.M., a Pennsylvania State Policeman arrived on the scene at F. R. & S. Landfill. The Peti-

tioner, still concerned with the invalidity of the search warrant, requested this State Trooper to verify the validity of the search warrant. Apparently the officer refused. At approximately 12:45 P.M., U. S. Deputy Marshall Duross arrested the Petitioner. (A-49) After the Marshall and the Petitioner left the area, it was the State Trooper and not the U. S. Marshall who directed Peter Bronner, Maureen Brennan, Mr. Donnelly, and Mr. Thomas to take the water samples. It must be emphatically noted that Marshall Duross was not present when the search warrant was executed.

During the course of the trial and in the District Court's charge to the jury, the District Court refused to allow Petitioner to place in issue the invalidity of the search warrant.

The Prosecutor, in his closing argument to the jury, twice stated his opinion as to the Petitioner's guilt.

REASONS FOR GRANTING THE WRIT

I

This Case Raises an Important Question of Federal Law Which Has Not Been Considered Previously by This Court, to Wit: Whether a United States Deputy Marshall Acquires the Status of a United States Officer Attempting to Execute a Search Warrant Within the Meaning of 18 U.S.C. Section 1501 via an Application of 18 U.S.C. Section 3105 When the United States Deputy Marshall Serving the Search Warrant Never Intended to Execute the Search Warrant, Never Intended to be Present During the Search, and Never Intended to Participate in Conducting the Search.

This Court has never rendered a decision interpreting either 18 U.S.C. Section 1501, or 18 U.S.C. Section 3105. Guidance is needed from this Court to determine the requirements for a United States Deputy Marshall to acquire the status of a United States Officer attempting to execute a search warrant within the meaning of 18 U.S.C. Section 1501 via an application of 18 U.S.C. Section 3105. Further, guidance is needed from this Court to clarify the methods by which and the extent to which a United States Officer may delegate his authority to other persons to execute a search warrant requiring scientific and technical expertise.

The decision of the District Court, affirmed by the Court of Appeals, held that the Petitioner was not being charged with obstructing the Marshall's service of the search warrant; the only issue in this case was whether the Petitioner, knowingly and willfully, obstructed the Marshall's attempted execution of the search warrant. The District Court, in its decision, stated:

> "To prove the offense charged, the Government was required to establish that the officer was attempting to execute judicial process of the United States Magistrate,

that the Defendant obstructed, resisted or opposed the officer, and that the Defendant acted knowingly and willfully." at page 11

At trial, United States Deputy Marshall Duross, the officer who served the search warrant, testified that his only purpose for being on F.R.S. Landfill property was "to serve the warrant only". Further, the Marshall testified that he never intended to take any water samples; that he did not know the locations where the water samples were to be taken; or which individual from the Environmental Protection Agency was going to take the water samples. There was absolutely no testimony in this case whatsoever that the Marshall intended to be present during the execution of the search warrant, or that he intended to participate in conducting the search. It is absolutely clear from the record that Marshall Duross never intended or attempted to execute the search warrant.

According to the terms of the search warrant, only a United States Marshall or his authorized representative had the authority to execute the search warrant. In addition to the fact that Marshall Duross did not intend or attempt to execute the search warrant, the Marshall testified that he did not authorize anyone else to execute the search warrant.

In light of the testimony presented in this case, it was both factually and legally impossible for the Petitioner to commit the crime as charged. Viewing the evidence in the light most favorable to the Government, the Government failed to establish a prima facie case. Since the evidence in this case is insufficient to sustain a conviction of the crime charged, the District Court, affirmed by the Court of Appeals, erred in denying Petitioner's motions for a judgment of acquittal.

The District Court, affirmed by the Court of Appeals, held that Marshall Duross acquired the status of a United States Officer attempting to execute a search warrant via an application of 18 U.S.C. Section 3105, which provides:

"A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

In effect, the opinion of the District Court holds that where a United States officer intends only to serve a search warrant, does not intend to be present at or participate in the actual execution of the search warrant, a United States officer may acquire the status of an officer attempting to execute a search warrant by that officer's mere association at the time of his service of the search warrant with other unauthorized persons who actually conduct the search at a later time. In other words, the United States officer does not have to intend to be present at or participate in the actual search in order to acquire the status of an officer attempting to execute a search warrant within the meaning of 18 U.S.C. Section 1501.

The holding of the District Court is clearly erroneous. A strict construction of 18 U.S.C. Section 3105 discloses the following three (3) points. First, an authorized officer may be aided only in the service of the search warrant, not in the execution of the search warrant. Second, the authorized officer has to be present at the time the search warrant is served and executed. Third, the authorized officer has to be acting in the execution of the search warrant. The facts of this case do not fit within the statutory requirements provided in 18 U.S.C. Section 3105. Further, the cases cited by District Court as precedent for the facts in this case are clearly distinguishable in that in all of those cases, an authorized official was present at the time the search was conducted, was active and participated in conducting the search, and was directing the execution of the search warrant.

In *United States v. Kennedy,* 457 F.2d 63 (10th Cir.), cert. denied, 409 US 684 (1972), cited by the District Court, a search warrant was directed to a Sheriff, but was served and executed by an Undersheriff. At the time the Undersheriff served and ex-

ecuted the search warrant, he was assisted and accompanied by two civilians. The Court held:

> "The fact tnat Swanstrom and Fuzell assisted in the search is of no consequence since they were *at all times acting in the company and under the direction of Undersheriff Dana.*" at page 67 (emphasis added)

In *United States v. Joseph,* 174 F Supp 539 (E.D. PA. 1959), aff'd, 278 F.2d 504 (3rd Cir.), cert. denied, 364 US 823 (1960), also cited by the District Court, the Court held:

> "The three officers named in the warrant were all *present at the search and active in its conduct.* The fact that they were assisted by other special agents does not invalidate the search as contended by Petitioner." at page 545 (emphasis added)

In *Nuckols v. United States,* 99 F.2d 353 (D.C. Cir.), cert. denied sub nom *Floratos v. United States,* 305 US 626, (1938), also cited by the District Court, the Court held:

> "Search warrants were not invalid on the ground that they were not executed by United States marshall, where warrants were directed to marshall and deputy marshall was *at all times present during raid and seizure of property,* and it was immaterial that he was assisted in the search by police officers." at page 353 (emphasis added)

In *Romero v. Squier,* 133 F.2d 528 (9th Cir.), cert. denied, 318 US 785 (1943), also cited in the District Court decision, the Philippine Commonwealth issued a search warrant to a Philippine officer of the law authorizing a search for stolen maps belonging to the United States Army. A Major Evans of the United States Army accompanied the Philippine police officer in that officer's search for the stolen maps. The Philippine police officer needed Major Evans to identify the stolen maps. The Court made an important distinction between the situation in which an unauthorized person conducts a search alone, and the situation in which an authorized official and unauthorized

person jointly participate and conduct the search. The Court held:

> "The search was made by a Captain of the Philippine Police of Constabulary and was accompanied by other police officers and by Major Evans, who could identify the maps belonging to United States. It is entirely proper for the police, duly authorized to make a search, to take along persons for the identification of the property from which the warrant is issued." at page 530

However, the Court in so holding implied that had Major Evans alone conducted the search, the search would have been invalid.

The facts in the present case are different and distinct from the facts in the cases cited by the District Court. United States Deputy Marshall Duross was neither present nor active in conducting the search. The Marshall testified that his only intent was "to serve the warrant only". The Marshall never intended to participate in conducting the search; he never intended to execute the search warrant.

In *Leonard v. United States,* 6 F.2d 353 (1st Cir. 1925), the Court addressed the issue of whether a search warrant executed by an unauthorized person rendered the search invalid and illegal. The Court stated:

> "But if the warrants were not invalidated by inclusion in their direction of a class of persons as officers, not known to law to be such, *they were not executed by the prohibition officer to whom they were directed but by a stranger, one not named in the direction. Neither were they executed in the presence of the officer named.* This is shown by the returns for the warrants and by the evidence introduced at the trial of the cases. Section 7, Title 11, of the Espionage Act, directs that 'a search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, ex-

> cept in aid of the officer on his requiring it, he being present and acting in its execution.' For this reason we think the searches and seizures were illegal and that the evidence obtained thereby was incompetent and it should have been excluded." at page 355 (emphasis added)

The facts in the instant case fit squarely within the legal framework provided by *Leonard v. United States,* supra. In this case, four unauthorized people (strangers to the directions of the search warrant) "executed" the search warrant. This "execution" of the search warrant by *strangers* rendered the search warrant's execution invalid, illegal, legally non-existent. Therefore, there existed no execution or attempted execution of the search warrant which the Petitioner could have obstructed.

In *United States v. Miah,* 444 F. Supp. 996 (E.D. PA. 1977), a search warrant was addressed to the "U. S. Marshall or his authorized agent." The search warrant, however, was served and executed by an FBI agent who was not specifically authorized by the U. S. Marshall to serve and execute the search warrant. The Court stated:

> "Defendant contends that this constituted an improper execution of the warrant and mandates suppression of evidence seized pursuant to it.
>
> In response, the government contends first that by virtue of 18 U.S.C. Section 3105 and 18 U.S.C. Section 3107 FBI agents are empowered to execute any warrant relating to a violation of the laws of the United States, even where the warrant is not addressed to them. I find that this reading of the statutes is too broad. There may well be situations in which magistrate specifically wishes to preclude the FBI from participating in a particular search. I have found no support for the proposition that Congress wished to eliminate that possibility by enacting 18 U.S.C. Sections 3105 & 3107.

> Nor can I agree entirely with the government's second contention that the failure of the magistrate to specify the FBI in the warrant is by definition a "mere technical" violation of Federal Rule of Criminal Procedure 41(C) and can never support suppression. As noted above, there may be important reasons for which the magistrate may wish to deny a specific law enforcement agency authority to execute a warrant. To hold that it is a mere technicality for the agency to override the magistrate's wish would effectively withdraw the magistrate's power and immunize the agency from all sanctions for disregarding authority." at pages 1001, 1002

The Court, however, denied the Defendant's suppression motion finding the Defendant was not prejudiced by the FBI's execution of the warrant. In that case, the Magistrate could have specifically directed the search warrant to the FBI agent; Magistrate's failure to do so was a "mere oversight".

Applying the law as stated in *United States v. Miah,* supra, to the facts of the instant case mandates that the Petitioner's alleged actions directed towards employees of the Environmental Protection Agency were not illegal. These employees of the Environmental Protection Agency were not "specifically authorized" by Marshall Duross to execute the search warrant. The U. S. Magistrate could not have directed the search warrant to any one of these Environmental Protection Agency employees. Federal Rule of Criminal Procedure 41(C), Title 18 U.S.C.

In *United States v. Gannon,* 201 F. Supp. 68 (D.Mass. 1961), a search warrant was directed "to any U. S. Marshall, any of his deputies, or any authorized person". Two special agents of the Bureau of Internal Revenue served and executed the search warrant. The Court in analyzing the relationship of Rule 41(C) of the Federal Rules of Criminal Procedure to 18 U.S.C. Section 3105, concluded the following:

> "Thus, two categories of persons have standing to execute:
> 1. Those mentioned in the warrant, and, additionally,
> 2. Those officers authorized by law." at page 71

The Court in determining that the two special agents fell within the second category, officers authorized by law to serve and execute a search warrant, stated the test for making such a determination:

> "The direction is intended to authorize execution by anyone whom the Commissioner could by specific designation have directed or allowed to execute the search warrant." at page 73

The Court was careful to make the distinction that the service and execution of the search warrant by the two special agents was valid because the two special agents were authorized by law to serve and execute the search warrant, and not because the two special agents were aiding the United States Deputy Marshall. Although the Court found that the two special agents and the U. S. Deputy Marshall jointly entered the premises and seized the articles listed, at page 71, the Court stated the following:

> "To guard against misapprehension, the Court should add that it has *not* rested the validity of the seizures of gambling material at 584 Beach Street upon the presence of the U. S. Deputy Marshalls. Those Marshalls *were not in charge* of the special agents. And the material seized by the special agents was not given to the United States Marshall but was held by the Internal Revenue Service." at page 74 (emphasis added)

There is absolutely no evidence in this case which remotely suggests that Marshall Duross was in charge of the Environmental Protection Agency employees. Further, there is absolutely no evidence that the water samples were given to Marshall Duross, or that he ever intended to receive the water samples.

In light of the analysis of the proceeding cases, the evidence in this case is totally insufficient to sustain the District Court's findings that the United States Deputy Marshall Duross acquired the status of an executing officer attempting to actively conduct and direct the execution of a search warrant via an application of 18 U.S.C. Section 3105. The Court of Appeals abused its discretion in affirming the decision of the District Court. The Petitioner's motion for judgment of acquittal should have been granted. This Court should provide guidance to the lower courts on interpreting both 18 U.S.C. 1501 and 18 U.S.C. 3105.

II

This Case Raises an Important Question of Federal Law Resulting in Conflicting Decisions Between the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Sixth Circuit Which Has Not Been Considered Previously by This Court, to Wit: Whether the District Court, Affirmed by the Court of Appeals, Committed Prejudicial Error in Not Allowing the Petitioner Charged With Violating 18 U.S.C. Section 1501 to Place in Issue the Invalidity of the Search Warrant, Which Was Invalid on its Face.

During the course of the trial and in the District Court's charge to the jury, the District Court, affirmed by the Court of Appeals, refused to allow Petitioner to place in issue the invalidity of the search warrant. The search warrant was invalid on its face in that only one page of a multi-page search warrant was presented to the Petitioner; no affidavit of probable cause was attached to the search warrant; and the property to be searched was obviously inadequately described in that the description of the property was to be continued on an "attached page".

The decision in the present case conflicts with a decision rendered in the United States Court of Appeals for the Sixth Circuit. In *Sparks v. United States,* 90 F.2d 61 (6th Cir. 1937), the Court held:

> "The validity of the search warrant is always relevant on the question of obstructing an officer in the performance of his duty. Resistance to a search carried out under an invalid warrant is not illegal." at page 63

In an analogous area of the law, this Court has held that a person has a right to resist an unlawful arrest;

> "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases." *United States v. DiRe,* 332 U.S. 581 at 594, 92 L.Ed. 210 (1948)

See also *Brown v. United States,* 47 F.2d 681 (5th Cir. 1931)

In opposition to these cases the District Court, affirmed by the Court of Appeals, cited the case of *United States v. Ferrone,* 438 F.2d 381 (3rd Cir.), cert. denied, 402 US 1008 (1971). The government admitted at the preliminary hearing that *United States v. Ferrone,* supra, was not applicable to this case:

> "Your Honor, this case is not directly on point. The case refers to the felony, which is Section 111. The government does not suggest that anybody was in danger of their life or limb in this case."

The language in *United States v. Ferrone,* supra, speaks only of forceable resistance:

> "For the reasons that follow, we hold that a person does not have a right to *forceably resist the execution* of a search warrant by a peace officer or government agent, even though that warrant may subsequently be held to be invalid." at page 390

The Court in *Ferrone,* supra, reached its decision by weighing the interests society has in securing for its members a right to be free from unreasonable searches and seizures, against the interest of society in minimizing the use of violent self-help in the resolution of those disputes. Using this balancing test, the scales should shift in favor of the societal interest in securing for its members the right to be free from unreasonable searches and seizures when the societal interest in minimizing the use of violence or force does not exist. In the instant case, the Petitioner did not use any force in his alleged resistance against the execution of the invalid search warrant. In fact, United States Deputy Marshall Duross testified that he did not fear or feel threatened by the Petitioner.

Further, the holding in *Ferrone,* supra, should not apply when the search warrant is invalid on its face and the Petitioner's actions were a result of provocation. (See footnote 19(C), *United States v. Ferrone,* supra, at page 390) The Petitioner's actions were a result of two different types of provocation. First, the Petitioner was provoked by the patently unlawful search warrant. At common law, patently unlawful legal process was by definition a provocation to the citizen. See, Chevigny, Paul G., The Right to Resist an Unlawful Arrest, 78 Yale L.J. 1128, at page 1131 (1969). Second, Petitioner's actions were provoked by Peter Bronner, an employee of the Pennsylvania State Department of Environmental Resources, who accompanied the Environmental Protection Agency employees. It is obvious from the testimony that the Petitioner and Bronner disliked each other intensely; they had known each other for a long period of time. Bronner had previously taken samples at F. R. & S. Landfill on December 1, 1977. As a result of this investigation, Bronner filed a private criminal complaint against F. R. & S. Landfill which was dismissed. Bronner personally prosecuted this case. After that case was dismissed, Bronner threatened the Petitioner with future investigations. On April 25, 1978, the Petitioner told Maureen Brennan, an Environmental Protection Agency employee, not to bring Bronner with her

the following day; Bronner came anyway. On April 26, 1978, the Petitioner upon seeing Bronner on F. R. & S. Landfill told Bronner to leave the property immediately. Bronner then insisted on arguing with the Petitioner for at least 10 minutes. Notwithstanding the Petitioner's repeated requests, Bronner insisted on returning to F. R. & S. Landfill. It is obvious that Bronner's conduct provoked the Petitioner's actions.

During the trial and on appeal the Petitioner alleged, and continues to allege, that the evidence that Petitioner knew that the person later proven to be James Duross was a United States Deputy Marshall was insufficient to sustain a conviction. At trial, there was absolutely no evidence presented whatsoever that James Duross ever told the Petitioner that he was a United States Deputy Marshall. The Marshall admitted in his testimony that the Petitioner never saw the Marshall's identification. In *United States v. Feola,* 420 U.S. 671, 43 L.ED 2d 541, 95 S.Ct 1255 (1975), this Court stated:

> "For example, when an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." at page 686

The holding in *United States v. Feola,* supra, postulates that a citizen may be justified in exerting an element of resistance when confronted with the unlawful use of force. This policy should be expanded to enable this Petitioner and future citizens to place in issue the invalidity of a search warrant when charged with knowingly and willfully obstructing the attempted execution of a search warrant in order to protect United States citizens from unreasonable searches and seizures in the future.

Because the search warrant was invalid on its face, the Petitioner's actions were provoked, the alleged resistance of the Petitioner was not forceable, and the Petitioner did not know that James Duross was a United States Deputy Marshall, the invalidity of the search warrant was a relevant issue in this case. For the foregoing reasons, this Court should provide guidance to the lower Courts concerning the relevancy of the invalidity of a search warrant in a criminal prosecution pursuant to 18 U.S.C. 1501.

III

This Case Raises an Important Question of Federal Law Resulting in Conflicting Decisions Between the Circuit Courts of Appeals Which Has Not Been Considered Previously by This Court, to Wit: Whether Petitioner Was Deprived of a Fair Trial Under the Due Process Clause of the Fifth Amendment to the United States Constitution by the Prosecutor, In His Closing Argument, Stating His Opinion as to the Petitioner's Guilt, Said Opinion Being Modified by the Words "Based on the Evidence".

During his closing argument the Prosecutor twice expressed his personal opinion as to the Petitioner's guilt:

> "*I believe* there is only one reasonable inference from this testimony; *the Defendant wanted to stop the search and knew exactly what he was doing.* As the law phrases it, he did it knowingly and willfully." (emphasis added)

At the end of his closing argument, the Prosecutor stated:

> "I ask that you consider all the evidence and return with a just verdict. In this case, *I believe that verdict is guilty,* based on the evidence." (emphasis added)

Defense counsel objected and motioned for a withdrawal of a

juror. The District Court erroneously denied the motion. The District Court failed to caution and instruct the jury to disregard the Prosecutor's opinion.

The Court erroneously held that since the Prosecutor's opinion was modified by the words, "based on the evidence", the Petitioner was not prejudiced citing *Henderson v. United States,* 218 F.2d 14, 19 (6th Cir.), cert. denied, 349 US 920 (1955); *United States v. Somers,* 496 F.2d 723, 740 (3rd Cir.), cert. denied, 419 US 832 (1974); *United States v. Benson,* 487 F.2d 978, 981 (3rd Cir. 1973); and *United States v. Schartner,* 426 F.2d 470, 477 (3rd Cir. 1970). This holding conflicts with the decision of the First and Sixth Circuit Court of Appeals.

In *United States v. Bess,* 593 F.2d 749 (6th Cir. 1979), the Sixth Circuit reversed its holding in *United States v. Henderson,* supra. That Court held that the Prosecutor's personal belief arguments were improper even though it was clear that the Prosecutor's belief was based solely on the testimony advanced at trial. Specifically, the Court stated:

> "in this case, the Prosecutor was careful to interject the statement that his belief was 'based on the evidence which has been presented to you (the jury).' We do not believe that the use of this disclaimer should convert improper argument into proper argument. The adverse impact of personal expression or opinions are still present, regardless whether counsel purports to limit the basis of opinion to the facts at trial. Further, to blink at what the Prosecutor did here is to allow the Prosecutor with impunity to import his personal vouching into his argument at almost any point. at page 756

In *United States v. Gonzalez Vargas,* 558 F.2d 631, at 633 (1st Cir. 1977), the Court held that the prejudice resulting from the Prosecutor's stating his personal opinion as to the Petitioner's guilt was not cured by any or all of the following: the fact that the Prosecutor's remarks did not suggest that extrinsic evidence of guilt existed; that the voir dire had purged the venire of any

jurors who might favor law enforcement; that the Court's instructions that arguments of both counsel were not evidence; and that the Prosecutor's final comment that justice would prevail whether appellant was convicted or acquitted. The Court held that this type of prosecutorial misconduct will always require the Petitioner be granted a new trial unless the following circumstances are shown; provocation by the defense, absence of an objection, or timely curative instruction directed particularly to the Prosecutor's comments.

The Prosecutor's statements were a flagrant example of professional misconduct. See, *ABA Code DR7-106(C) - 4;* American Bar Association's Standards for Criminal Justice No. 5.8; Drinker, Legal Ethics 147 (1953); and *Harris v. United States,* 131 U.S. APP. D.C. 105, 402 F.2d 656, (D.C. Cir. 1968).

In reviewing Third Circuit case law concerning prosecutorial misconduct the Court, in *United States v. Gallagher,* 576 F.2d 1028, at 1042 (3rd Cir. 1978), held:

> "This case law suggests, therefore, that before reversal is warranted based on the statements alone, those statements must be based on information not before the Court. If the statements are based on evidence, prejudice must be shown to result to the Defendant before reversal is warranted. Such prejudice can be cured by an appropriate instruction by the trial judge or by a finding that there is overwhelming evidence to support the conviction.

The permissive holding in *United States v. Gallagher,* supra, and its ancestors have failed to deter prosecutors from engaging in flagrant prosecutorial misconduct. Only a strict rule requiring reversal and new trial in the face of this type of prosecutorial misconduct will remind prosecutors of the words of this Court in *Berger v. United States,* 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935):

> "Although the prosecutor may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." at page 88

Judge Gibbons, joined by Judges Aldisert and Higginbotham, in his dissenting opinion in *United States v. Agee,* 597 F.2d 350 (3rd Cir. 1979), realized the necessity for a stricter rule when he stated:

> "Tongue clicking over bad practices has become a familiar routine in this Court...Our tongue clicking over improper argument by government counsel has been notoriously ineffective in preventing it, as the persistent need to resort to gentle chastisement amply demonstrates. Bland expressions of disapproval of improprieties and tepid endorsements of 'the better practice' are no substitute for the exercise of appellate judicial responsibility. I would grant a new trial." at page 371

For the foregoing reasons, Petitioner submits that he was denied a fair trial by the Prosecutor, in his closing argument, stating his opinion as to the Petitioner's guilt. There are frequent and substantial conflicts in the decisions among the Circuit Courts of Appeals concerning whether the prejudice caused by a prosecutor stating his opinion as to the Petitioner's guilt can be cured by a modification of that Prosecutor's opinion. This Court should provide guidance and uniformity for the lower Courts on this issue.

CONCLUSION

For the foregoing reasons, this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review that Court's judgment and opinion.

Respectfully submitted,

CALVIN LIEBERMAN & ASSOCIATES

Calvin Lieberman, Esquire
635 Walnut Street
Reading, Pennsylvania, 19601

APPENDIX

APPENDIX A

United States Court of Appeals
For the Third Circuit

No. 79-2380

UNITED STATES OF AMERICA

vs.

DONALD L. PEIFER

Donald L. Peifer,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 78-00202)

Submitted Under Third Circuit Rule 12(6)
February 14, 1980
Before: ALDISERT, WEIS and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the court erred in denying appellant's motion for judgment of acquittal because the evidence that United States Deputy Marshal Duross was attempting to execute the search warrant is insufficient to sustain a conviction and because the evidence that appellant knew that the person later proven to be James

Duross was a United States Deputy Marshal is insufficient to sustain a conviction; (2) the court committed prejudicial error in failing to instruct the jury on the appellant's theory of defense; (3) the court committed prejudicial error in admitting irrelevant and highly prejudicial evidence over timely objection of the appellant; (4) the court committed prejudicial error in denying the appellant's several motions for mistrial and withdrawal of a juror; (5) the court committed prejudicial error in not allowing the appellant to inquire into the invalidity of the search warrant which was invalid on its face; (6) the appellant was substantially prejudiced and deprived of a fair trial by the prosecutor, in his closing argument, stating his opinion as to the appellant's guilt; and (7) each of the errors standing alone is sufficient to warrant reversal, and in any event, their probable cumulative effect was to deny appellant of due process and a fair and impartial trial; the court abused its discretion in denying appellant a new trial;

And for the reasons set forth in the district court opinion by the Honorable E. Mac Troutman, *United States v. Peifer,* 474 F.Supp. 498 (E.D.Pa. 1979); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ R. J. ALDISERT
Circuit Judge

Attest:

THOMAS F. QUINN, CLERK

Dated Feb 14 1980

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 78-202

DONALD L. PEIFER

MEMORANDUM AND ORDER

TROUTMAN, J. AUGUST 17, 1979

Defendant operates F. R. & S. Landfill in Exeter Township, Berks County, Pennsylvania. On April 26, 1978, Deputy United States Marshal James Duross entered defendant's property with a warrant authorizing a search for samples of water and effluent suspected of being illegally discharged into the Schuylkill River.[1] Defendant hailed the marshal with the words, "So this is the big Marshal". Within a few moments after service of the warrant, defendant perused its content, objected to its form, declared it invalid and pocketed it promptly. He told the marshal that he, the defendant, would not allow the samples to be taken, and that if samples were taken, the marshal and accompanying employees of the Environmental Protection Agency (EPA) and Pennsylvania Department of Environmental Resources (DER) would not be permitted to leave the property.

During the next fifty minutes the search party engaged in various negotiations with the defendant to resolve their differences. The marshal drove his car to a higher point on the landfill several times to communicate by radio with his superiors in Philadelphia. Subsequently, the search party decided to com-

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[1] *See* U.S.C.§§ 1311(a), 1319(c) and (d).

mence the search and began to drive down an unpaved road out of the landfill area enroute to an adjacent area described in the search warrant. Waving his arms, defendant ran out into the middle of the road and motioned the vehicles, including the marshal's, over to the side of the road. The search party complied with defendant's demands. At that point defendant ordered an employee, David Hart, to position a pickup truck across the exit road, thus preventing the marshal's progress. During the late morning defendant's employees moved the truck several times to permit the ingress and egress of various vehicles, including refuse trucks and on one occasion the car of a state trooper. After each movement the truck was returned to its position across the road. At one point, defendant told Peter Bronner, a DER inspector and investigator, that the purpose of blocking the vehicles was to guarantee that he, Peifer, would be able to tow them out. At 12:45 P.M., approximately two hours after the marshal had served defendant with the warrant, he arrested defendant. The pickup truck was then moved out of the way and the search party continued to contiguous areas to begin sampling and tests.

After a six-day trial a jury convicted defendant of knowingly and willfully obstructing, resisting and opposing an officer of the United States in his service and execution of judicial process of a United States magistgrate in violation of 18 U.S.C.§ 1501. Defendant now moves for judgment of acquittal notwithstanding the verdict, and in the alternative for a new trial, contending that the Court erred in denying the defendant's pre-trial motions, erred in several evidentiary rulings and alleging that the verdict was contrary to the weight of the evidence.

I

Prior to trial defendant moved for a bill of particulars, in which he demanded names and addresses of persons present at the place of the incident and during a conversation between the defendant and "the victim", the make and model of the vehicles

placed on the road, and the "exact nature of the inquiry or investigation by the Government upon which it predicated its answers and representations". Defendant also moved for the government's witness list, "for notice by the government of the intention to use evidence"[2], and to dismiss the information on the grounds of improper arraignment and venue and impermissible vagueness in the information.

The purpose of granting a bill of particulars under Rule 7(a) of the Federal Rules of Criminal Procedure is

> to inform the defendant of the nature of the charges against him (so that he may) adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described defense.

United States v. Addonizio, 451 F. 2d 49, 63-64 (3d Cir.), *cert. denied,* 405 U.S. 936, *reh. denied,* 405 U.S. 1048 (1972). However, the defendant is not entitled, in advance, to a complete preview of the government's evidence and case or to "wholesale discovery" of the prosecutor's file. *United States v. Armocida,* 515 F. 2d 49, 54 (3d Cir.), *cert. denied sub nom. Gazal v. United States,* 423 U.S. 858 (1975), *United States v. Addonizio, supra* at 64. Prior to trial defendant is not entitled to know the identity of government witnesses through a motion for a bill of particulars or a discovery motion under Rule 16. *United States v. Mitchell,* 540 F. 2d 1163, 1166 (3d Cir.1976), *United States v. Addonizio, supra* at 64, *United States v. Smith,* 405 F. Supp. 144, 146, (E.D. Pa. 1975), *United States v. Jaskiewicz,* 278 F. Supp. 525, 529 (E.D. Pa. 1968). Similarly, defendant is not entitled to the statements of all government witnesses prior to trial. Fed. R. Crim.P. 16(b), Jencks Act, 18

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[2] In effect this motion requested material potentially exculpatory to the defendant, *Brady v. Maryland,* 373 U.S. 83 (1963), and materials described by Fed. R. Crim. P. 12(d)(2). The government represented that it had supplied all such materials, and on that basis defendant's motion was denied as moot.

U.S.C.§§ 3500(a) and (e)(3), *United States v. Feinberg,* 502 F. 2d 1180, 1182 (7th Cir. 1974), *United States v. Smith, supra* at 145, *United States v. Leta,* 60 F.R.D. 127, 130 (M D. Pa. 1973), or disclosure of the government's legal theories or evidentiary details. *United States v. Addonizio, supra* at 64, *United States v. Conway,* 415 F. 2d 158, 162 (3d Cir.1969), *cert. denied,* 397 U.S. 994 (1970), *United States v. Mt. Fuji Japanese Steak House, Inc.,* 435 F. Supp. 1194, 1198 (E.D. N.Y. 1977), *United States v. Leonelli,* 428 F. Supp. 880, 882-83 (S.D. N.Y. 1977), *United States v. Bloom,* 78 F.R.D. 591, 600 (E.D. Pa.1977).

Denial of the bill of particulars could not have adversely affected defendant's ability to prepare his defense adquately. He was present most of the time that the marshal stayed on the property and was obviously present when he ordered the pickup truck placed across the road. Defendant saw who was there and heard what was said. In light of the information provided under Rule 16 and gleaned from the probable cause hearing, the factual details and legal issues which arose at trial could hardly have been surprising.

Defendant also filed a pre-trial motion alleging violations of Fed. R. Crim. P. 5(a) and *Mallory v. United States,* 354 U.S. 449 (1957) and urging dismissal of the information because of the government's "(f)ailure to obtain proper venue by taking the defendant to Philadelphia, Pennsylvania, rather than to the nearest United States Magistrate in Reading." Defendant's Memo at 2. The purpose of Rule 5(a) is to guarantee that the government does not use delay between arrest and an initial appearance to subject defendants to unwarranted or coercive interrogation. *Mallory v. United States, supra* at 453-54, *United States v. Gaines,* 555 F. 2d 618, 622 (7th Cir. 1977). Where delay is not in fact used for that purpose, no prejudice results and *Mallory* is irrelevant. *United States v. Grandi,* 424 F. 2d 399, 402-03 (2d Cir. 1970), *cert. denied,* 404 U.S. 870 (1971)[3].

[3] Defendant's allegation of improper venue is without merit. Both the site of the offense and Philadelphia are in the Eastern District. No issue of venue therefore arises.

In the case at bar defendant alleges that the "additional delay in awaiting transportation to Philadelphia was calculated to deprive the defendant of his constitutional guarantees". Defendant's Memo at 2. Yet defendant does not show what prejudice resulted from the alleged delay or upon what constitutional rights this delay impinged. Defendant obtained his initial hearing before a United States magistrate a few hours after arrest. Bail was posted, and defendant was advised fully of the charges against him. Government's agents elicited no statements from defendant between the time of his arrest and initial hearing. Therefore, no prejudice resulted from selection of Philadelphia as the place to bring defendant before a magistrate[4]. No relief was warranted.

Defendant's final pre-trial motion assailed the information as fatally vague because it failed to name the officer of the United States allegedly intimidated and to state that the judicial process was legal in form and purpose and to name which United States magistrate issued it. The standard by which to test the sufficiency of an indictment or information is simply whether the time, place and elements of the offense charged are alleged therein. *United States v. Gibbons,* 463 F. 2d 1201, 1202 (3d Cir. 1972), *United States v. Kenny,* 462 F. 2d 1205, 1214 (3d Cir.), *cert. denied sub nom. Kropke v. United States,* 409 U.S. 914 (1972). Nowhere does defendant allege or suggest that these standards are not met. Instead, defendant complains that the information is defective because neither the magistrate authorizing the warrant nor the serving officer is named therein. But the issue is "not whether (the information) could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged". *Hagner v. United States,* 285 U.S. 427, 431 (1932). Defendant does not contest the fact that

[4] The *Mallory* court also noted that "(t)he duty enjoined upon arresting officers to arraign 'without unnecessary delay' indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment". *Mallory v. United States, supra* at 455.

the information completely describes each element of the charged offense. Nor can defendant seriously assert that the identity of either the magistrate or serving officer remained unknown at trial. Defendant learned the identity of the serving officer during the probable cause hearing; the identity of the magistrate is patent from the search warrant itself, which the defense introduced into evidence at the probable cause hearing. Furthermore, discovery material which the government provided to defendant pursuant to Rule 16, information provided defendant at the probable cause hearing and facts set forth in the complaint and warrant sufficiently apprised defendant of the precise facts and issues to be litigated at trial. Policies supporting the requirement of a descriptive information are fully satisfied under these circumstances. Undoubtedly, defendant

> would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that *(he) could rely upon parts of the present record* in the event that future proceedings should be taken against (him).

Russell v. United States, 369 U.S. 749, 764 (1962). Accordingly, defendant's motion for a judgment of acquittal on the basis of improper pre-trial rulings will be denied.

II

Defendant also predicates the present motion on several evidentiary errors. Specifically, defendant cites as error admission of "irrelevant" and "highly prejudicial" testimony by Maureen Brennan, an EPA attorney, and Peter Bronner regarding defendant's interference with their attempts to conduct the search. The lack of a relationship between the "evidence they presented and a matter properly provable in this case" and the implication that they "were cloaked with the authority of the United States Marshall (sic)", supposedly provide the basis upon which the Court should have excluded this testimony.

Both Brennan and Bronner were eyewitnesses to the res gestae. Certainly their testimony, as with all incriminating evidence, was highly prejudicial to defendant. But the critical question is whether the admitted evidence is *unfairly* prejudicial. In light of its relevance and probity this evidence can hardly be considered unfair.

Defendant also challenges the Court's refusal to charge the jury that "(i)f you the jury find that (the marshal) did not authorize anyone to execute the search warrant you must find the Defendant Donald L. Peifer not guilty". Ordinarily, a defendant is entitled to have the jury instructed on the theory of his defense even though the evidence may be "weak, insufficient, inconsistent or of doubtful credibility". *United States v. Lehman,* 468 F.2d 93, 108 (7th Cir.), *cert. denied,* 409 U.S. 967 (1972). *See also United States v. Taglione,* 546 F.2d 194, 198 (5th Cir. 1977). However, where, as here, the theory of defense as stated is incorrect as a matter of law the Court properly declined to intromit the point for charge in its instructions to the jury. *United States v. Westbo,* 576 F.2d 285, 288 (10th Cir. 1978), *United States v. Hall,* 552 F.2d 273, 275 (9th Cir. 1977), *United States v. Hall,* 536 F.2d 313, 330 (10th Cir. 1976). Rarely does a marshal himself execute a search warrant requiring scientific expertise. The obvious purpose of bringing along the EPA and DER employees and a truck filled with scientific equipment was to have *them* locate the site and actually collect the water and effluent samples. In fact, Brennan testified that she and the marshal had an understanding that EPA would collect the samples.

Anticipating a situation of this type, Congress passed 18 U.S.C. § 3105, which provides that

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, *except in aid of the officer on his requiring it, he being present and acting in its execution.*

Accordingly, the contemplated search was valid as one directed by the marshal, *United States v. Kennedy,* 457 F.2d 63 (10th Cir.), *cert. denied,* 409 U.S. 864 (1972), *United States v. Joseph,* 174 F. Supp. 539 (E.D. Pa. 1959), *aff'd,* 278 F. 2d 504 (3d Cir.), *cert. denied,* 364 U.S. 823 (1960), *Palmer v. United States,* 203 F. 2d 66 (D.C. Cir. 1953), *Nuckols v. United States,* 99 F. 2d 353 (D.C. Cir.), *cert. denied sub nom Floratos v. United States,* 305 U.S. 626 (1938), and because technical expertise was required to execute the warrant, the marshal's use of assistance did not vitiate the search or affect his status as the named executing officer. *Romero v. Squier,* 133 F. 2d 528 (9th Cir.), *cert. denied,* 318 U.S. 785 (1943). The Court properly refused to charge the jury as requested by defendant.

Next, defendant labels the jury charge as conflicting, misleading, and "substantially" confusing. The Court instructed the jury, in part, as follows:

> As I have stated previously the law never imposes upon the defendant in a criminal case such as this the burden or duty of calling any witnesses or producing any evidence.
>
> * * *
>
> If a party offers weaker and less satisfactory evidence when in your belief stronger and more satisfactory evidence could have been produced, you may view the evidence offered with suspicion.

Defendant contends that the jury could have construed the second instruction to suggest that defendant's failure to take the stand constituted evidence of a "weaker and less satisfactory" case. The first statement was a reminder to the jury of defendant's Fifth Amendment right; the second was a charge *requested by defendant himself.* If, indeed, the jurors connected these two thoughts, the Court's repeated references to a defendant's right to refuse to testify and produce evidence certainly

clarified any ambiguity which defendant's requested instruction may have created.[5]

Defendant also considers another pair of instructions confusing. The Court instructed the jury that

> (a)n act is done 'knowingly' if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. *The purpose of adding the word 'knowingly' is to insure that no one will be convicted by an act done because of a mistake or accident or other innocent reason.*
>
> * * *
>
> It is not necessary for the prosecution to prove that the defendant knew that a particular act or failure to act is a violation of the law. *Unless and until outweighed by evidence to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done.*

Defendant complains that the jury could have interpreted the underscored portion of the second instruction to mean "that if an act is illegal, the Defendant is presumed to know the action was illegal". Defendant's Supplemental Brief at 19. Hopefully the jury did import that meaning to these words, for it is a correct statement of law. Every person *is* presumed to know the law. *United States v. Murdock,* 290 U.S. 389, 393-96 (1933), *Shevlin-Carpenter Co. v. Minnesota,* 218 U.S. 57, 68 (1910), *Williamson v. United States,* 207 U.S. 425, 453 (1907). Defendant further postulates that from this instruction the "reasonable juror could easily have presumed that the defendant knew James Duross was a United States Marshall(sic)". Defendant's Supplemental Brief at 19. The flaw in this argu-

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[5] *Five* times the Court cautioned the jury that "the law never imposes upon a defendant in a criminal case the burden or the duty of calling any witnesses whatever or producing any evidence". A *sixth* time the Court explained that "the law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify".

ment is that defendant's knowledge of Duross' status was a question of fact, not law. The Court did not instruct the jury that defendant was presumed to know the facts.

Additionally, the first instruction, which defendant considers prejudicially confusing in light of the later one, deals with mistake of fact; the second instruction, mistake of law. As stated, both instructions were clear and accurate. The jury was instructed properly, *Carlton v. United States,* 395 F. 2d 10, 12 (9th Cir.1968), *cert. denied,* 393 U.S. 1030 (1969), and defendant's motion for judgment of acquittal on this ground will be denied.

Of the evidentiary errors asserted only defendant's challenge to the Court's refusal to hear testimony concerning the validity of the search warrant requires further comment. A defective warrant is no defense to a charge of resisting execution thereof. That issue is resolved through a later legal mechanism, the suppression hearing. *United States v. Ferrone,* 438 F. 2d 381, 389-90 (3d Cir.1971), *cert. denied,* 402 U.S. 1008 (1971).[6] Once a court with proper jurisdiction over the subject matter and person issues an order, it "must be obeyed by the parties until it is reversed". *United States v. United Mine Workers of America,* 330 U.S. 258, 293 (1947). Absent a showing of bad faith, unreasonable force or provocative conduct, defendant has no right to resist execution of a warrant, even a defective one. *United States v. Cunningham,* 509 F. 2d 961, 963 (D.C. Cir. 1975), *United States v. Moore,* 483 F. 2d 1361, 1364 (9th

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[6] The *Ferrone* court remarked:

> Society has an interest in securing for its members the right to be free from unreasonable searches and seizures. Society also has an interest, however, in the orderly settlement of disputes between citizens and their government; it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes. We think a proper accommodation of

Cir.1973), *United States v. Ferrone, supra* at 390.[7] *See also United States ex rel. Kilheffer v. Plowfield,* 409 F. Supp. 677, 680-81 (E.D.Pa. 1976), *United States v. Gibbons,* 331 F.Supp. 970, 972-73 (D.Del. 1971), *aff'd,* 463 F.2d 1201 (3d Cir. 1972). Defendant did not make any such claims. Therefore, the validity of the search warrant served by Marshal Duross was irrelevant, and disallowing testimony on this issue was proper.[8]

III

Defendant next attacks the verdict as contrary to the weight of and unsupported by the evidence. As the verdict winner, the government is entitled to have all the evidence, direct and circumstantial, viewed in a light most favorable to the government. Conflicting evidence may not be weighed; credibility of witnesses may not be evaluated. All reasonable inferences must be construed in favor of the government. *United States v. Downen,* 496 F. 2d 314, 318 (10th Cir.1974), *United States v. Mancini,* 396 F. Supp. 75, 76 (E.D. Pa.1975), *United States v. Holland,* 378 F. Supp. 144, 148 (E.D. Pa.), *aff'd,* 506 F. 2d 1050 (3d Cir.1974), *cert. denied,* 420 U.S. 994 (1975). To prove

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[6] (continued)

> interests requires that a person claiming to be aggrieved by a search conducted by a peace officer pursuant to an allegedly invalid warrant test that claim in a court of law and not forcibly resist the execution of the warrant at the place of search. The development of legal safeguards in the Fourth, Fifth, Sixth and Fourteenth Amendment fields in recent years has provided the victim of an unlawful search with realistic and orderly legal alternatives to physical resistance.
> *Id.* at 390

[7] *Moore* and *Cunningham* deal with the right to resist arrest. However, the same reasoning applies. *United States v. Ferrone, supra* at 390 n.21.

[8] *A fortiori,* refusing to charge the jury as requested in defendant's first point for charge was not error.

the offense charged, the government was required to establish that the officer was attempting to execute judicial process of a United States magistrate, that the defendant obstructed, resisted or opposed the officer, and that the defendant acted knowingly and willfully. *See* 18 U.S.C.§1501. The government did not need to show that defendant threatened or performed an act of violence, *Miller v. United States,* 230 F. 2d 486 (5th Cir. 1956), *United States v. MacDonald,* 26 Fed. Cas. 1074, 1077 (C.C.D. Maine 1879) (No. 15, 667), only that defendant *or his agent performed an act which delayed or interfered with the service or execution of process, United States v. MacDonald, supra* at 1077, for acts of an agent or employee commanded by defendant are chargeable to defendant as if he himself had performed the acts. *United States v. Wise,* 370 U.S. 405, 417 (1962), *United States v. Deaton,* 563 F. 2d 777 (5th Cir. 1977).

Defendant contends that the government did not establish each element. According to defendant, the marshal testified that he never intended to execute the search warrant himself, that he authorized no one else to execute it, and therefore defendant could not have interfered with execution. As noted above, this argument is without merit. Defendant's final attack upon the verdict concerns defendant's alleged lack of specific criminal intent. That is, the government did not establish that defendant acted willfully and knowingly. Defendant claims that he did not know who the marshal was and therefore could not have intended to obstruct service. Testimony of the marshal himself contradicts these representations. Defendant, in fact, concedes that he greeted Duross with the words "So this is the big marshal". Defendant also received the warrant personally from the marshal. From this action alone defendant was on alert to the fact that Duross was a Federal officer. Defendant also refused to examine the marshal's identification and later told the marshal, "If you take samples on my property, you will not get off with them". From this testimony the jury reasonably could have concluded that the defendant knew who Duross was and knowingly prevented execution of the warrant. From defendant's

gesticulations, actions and words the jury could have reasonably concluded defendant acted willfully. Testimony of Maureen Brennan, Peter Bronner and David Hart supports these conclusions. Where, as here, substantial evidence supports the verdict, it must be sustained. *United States v. Trotter,* 529 F. 2d 806, 811 (3d Cir. 1970).

IV

Lastly, defendant assigns as error the Court's refusal to declare a mistrial after government counsel, in his closing remarks to the jury, supposedly indicated his own personal belief in defendant's guilt. Government counsel remarked, "I ask that you consider all the evidence and return here with a just verdict. In this case I believe that verdict is guilty, *based on the evidence".* This comment must be evaluated in light of the entire context and purpose of counsel's closing remarks.[9] *Hall v.*

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[9] In fact, government counsel's closing remarks were a model of clarity and cogency. Urging the jurors to look past courtroom histrionics to the facts presented from witnesses and to the single issue for their consideration, counsel reviewed the events of the day in question. He continued:

> Members of the jury, if you look at all the evidence I believe it will become absolutely clear why that pickup truck was placed there. It was moved back and forth a number of times to let other vehicles in and out; for example the refuse trucks... Why would the defendant do that and not motion the marshal out? Why did the defendant stand in the middle of the road? And why did he threaten to tow out those cars? Why did he tell the marshal he would never get off the landfill if he took samples?
>
> I believe there is only one reasonable inference from this testimony: the defendant wanted to stop the search. And he knew exactly what he was doing. As the law phrases it, he did it knowingly and willfully.

United States, 419 F. 2d 582 (5th Cir. 1969). After reviewing the testimony of the witnesses called at trial, counsel importuned the jury to be fair and imparital by stating:

> Now, members of the jury, I suggest that that is the hard evidence, that is the essential evidence, that is the important evidence in this case. On every essential fact and element there can be no doubt in your minds as to what happened on April 26, 1978, at that landfill.
>
> And as you retire to the jury room and discuss this case amongst yourselves, I ask now that you hold firmly and remember two all-important duties that you have: The first duty is to the facts. First, put aside everything else but the facts, and to determine as best you are able what those facts are.
>
> The second duty, which is no less important, is one of fairness. Under your oath as jurors you are bound to be impartial and unswayed by sympathy for or against the

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[9] (continued)

Counsel later remarked that:

> (t)he judge will instruct you that 'obstruction' means to interpose or to impede. It means to hinder, impede, or in any manner interrupt or prevent... Did the defendant interrupt or impede the marshal when he told the marshal he wasn't going to collect samples, and that if he did he wouldn't get off the property with them?
>
> Listen to that instruction on obstruction and ask yourselves: Did the defendant hinder or interrupt the marshal when he ran out into the middle of the road and motioned the cars over?
>
> And ask yourselves, members of the jury, if the defendant interposed an obstacle when he ordered David Hart to pull that truck up into the middle of the road.
>
> The answers to these questions, I suggest, is "yes"... And it follows directly from that that the defendant did obstruct the marshal within the meaning of the statute that we are concerned with. That is the issue in this case.

Counsel's final statements to the jury are set out in the text.

> defendant, for or against the government. You have promised to apply the law strictly as the judge gives it to you, and to give the defendant a fair trial, and to give the government a fair trial.
>
> I ask that you consider all the evidence and return here with a just verdict. In this case I believe that verdict is guilty, *based on the evidence.*

Having summarized the elements of the offense and evidence proffered as proof, counsel had the clear purpose of emphasizing to the jury that the evidence, not his judgment, supported a guilty verdict. *See United States v. Munford,* 431 F. Supp. 278, 289 (E.D. Pa.1977), in which the court found no prosecutorial excess when counsel stated

> Please consider the evidence. Consider it fairly for the government, consider it fairly for the defendants--and *I submit to you I think you will find that the evidence demonstrates that both are guilty.*

This is quite unlike the situation where the prosecutor's statements to the jury contained extrinsic evidence, *United States v. Schwartz,* 325 F. 2d 355 (3d Cir. 1963), matters asserted as fact but not in evidence, *Dunn v. United States,* 307 F. 2d 883 (5th Cir. 1962), or implications that the defendant withheld probative, inculpatory evidence, *McMillan v. United States,* 363 F. 2d 165 (5th Cir. 1966). Likewise, insinuating that defendant is guilty of another unspecific offense, labelling defendant as socially undesirable or attaching epithets such as "hoodlum" or "bum" to defendant's name also fall outside the scope of proper prosecutorial forensics. *Hall v. United States, supra.* But the prosecutor is not restricted to a sterile recitation of the facts. *United States v. Greene,* 497 F. 2d 1068 (7th Cir. 1974), *cert. denied,* 420 U.S. 909 (1975). He is an advocate, *Homan v. United States,* 279 F. 2d 767 (8th Cir.), *cert. denied,* 364 U.S. 866 (1960), and "may prosecute with earnestness and vigor", *Berger v. United States,* 295 U.S. 78, 88 (1935). He may also

> summarize the evidence and urge upon the jury all reasonable inferences and deductions from the evidence. *It is not misconduct on his part to express his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced* and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief.

Henderson v. United States, 218 F. 2d 14,19 (6th Cir.), *cert. denied,* 349 U.S. 920 (1955). *See also United States v. Somers,* 496 F. 2d 723, 740 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974), *United States v. Benson,* 487 F. 2d 978, 981 (3d Cir. 1973), *United States v. Schartner,* 426 F. 2d 470, 477 (3d Cir. 1970). Government counsel in the case *sub judice* clearly expressed himself in terms based on the evidence and did not suggest to the jury that inculpatory evidence not introduced at trial also established defendant's guilt. Defendant's motion for judgment of acquittal will be denied.

V

Defendant also moves for a new trial on the same grounds. The Court may grant a new trial "if required in the interests of justice". Fed. R. Crim. P. 33. Having found that substantial evidence supports the verdict and that the Court committed no prejudicial errors, we find no miscarriage of justice. Accordingly, defendant's motion for a new trial will be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. CRIMINAL NO. 78-202

DONALD L. PEIFER

ORDER

TROUTMAN, J.

AND NOW, this 17th day of August, 1979, upon consideration of defendant's motion for judgment of acquittal notwithstanding the verdict, and in the alternative for a new trial, and the Government's response thereto, IT IS ORDERED that the motion is DENIED.

Sentencing is scheduled for Wednesday, September 5, 1979, at 10:30 A.M. in Reading, Pennsylvania.

/s/ E. MAC TROUTMAN

APPENDIX C

Supreme Court of the United States

No. A-795

DONALD L. PEIFER,
Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 14, 1980.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of March, 1980.

APPENDIX D

Federal Constitutional Provisions and Statutes Involved

Amendment V to the Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

Sections 1501, 3105, 41(C), Title 18 United States Code.
Section 1501. Assault on process server

Whoever knowingly and willfully obstructs, resists, or opposes any officer of the United States, or other person duly authorized in serving, or attempting to serve or execute, any legal or judicial writ or process of any court of the United States, or United States commissioner; or

Whoever assaults, beats, or wounds any officer or other person duly authorized, knowing him to be such officer, or other person so duly authorized, in serving or executing any such writ, rule, order, process, warrant, or other legal or judicial writ or process--

Shall, except as otherwise provided by law, be fined not more

than $300 or imprisoned not more than one year, or both. June 25, 1918, c. 645, 62 Stat. 769.

Section 3105. Persons authorized to serve search warrant

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.
June 25, 1948, c. 645, 62 Stat. 819.

Rule 41. Search and Seizure

(c) Issurance and Contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probably cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon heresay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times

other than daytime. It shall designate a federal magistrate to whom it shall be returned.